

**Auxichem Vs. Commissioner of Central Excise**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

**Decided On :** Nov-03-2004

**Reported in :** (2005)(191)ELT368Tri(Mum.)bai

**Judge :** A M Moheb

**Appellant :** Auxichem

**Respondent :** Commissioner of Central Excise

**Judgement :**

1. The appeal arose out of the order of Commissioner of Central Excise Mumbai VI. In the impugned order the Commissioner dis-allowed modvat credit for Rs. 1,54,737/- under Rule 571 read with proviso to Section 11A of the Central Excise Act. Demanded interest under Rule 571, imposed an equal amount of penalty under Rule 571 (4) and imposed a penalty of Rs. 1 lakh on the appellant. Briefly the facts are that the Central Excise Officers found shortage of raw materials in the appellant's factory. The input credit taken on the raw material found short was Rs. 1,54,737/-. In the impugned order the Commissioner held that the credit is deniable, as the shortages have not been explained.

While demanding this amount under the above said provisions he also imposed an equal amount of penalty and interest as applicable in addition. He also imposed a penalty of Rs. 1 lakh under Rule 173Q for non-accountal of finished goods in terms of Rule 173Q(4).

3. The show cause notice issued in this regard alleged that the appellant suppressed facts regarding a production and clandestinely removed finished goods, the duty on such alleged removals was worked out to be Rs. 24,97,950/-. The Commissioner however dropped this demand as he held that there was no clandestine removal. The show cause notice also alleged that finished products valued at Rs. 1,87,250/-were not accounted and therefore were liable to confiscation. The Commissioner however, unconditionally released the goods seized on account of this allegation. The point that comes up for consideration is whether the Commissioner was right in imposing a penalty of Rs. 1 lakh for non accountal of finished goods when he unconditionally released the alleged unaccounted goods. Penalty under Rule 173Q can be imposed for either unauthorised removal of goods or for non-accountal of goods or for any of the reasons specified in Rule 173Q. In this case the Commissioner does not hold the goods in question liable to confiscation as he unconditionally released them. In such a case penalty under Rule 173Q should not have been imposed. I agree with the appellant's plea that the Commissioner erred in imposing this penalty.

4. In regard to the demand for Rs. 1,54,737/- being the modvat credit availed on the inputs found short. I observe that in para 53 of the impugned order, the Commissioner stated "the assessee have certainly failed to account for the inputs as required under Rule 57F of the Central Excise Rules, 1944". He nevertheless says that the appellants admitted that in respect of some of the inputs, which were issued from store room to production shop for use in the manufacture of the finished goods, no issue slips were issued. Thus it appears that the Commissioner was finding fault with the appellants for not maintaining proper accounts of the inputs as required under the rules. The Commissioner does not seem to be alleging that the inputs have actually been removed clandestinely after taking modvat credit on them. The appellants also submitted that the stock taking was not done properly inasmuch as goods packed in carboys, drums etc. were not actually counted/measured/weighed. It is also pleaded that the officers did not take into account goods that were scattered etc. The Commissioner has not dealt with this submission properly. When there is no finding that the inputs on which credit has been taken were clandestinely removed what remains is improper accounting of the inputs. For improper accounting a penalty could be imposed but duty cannot

be demanded. Non accountant is an offence under the Central Excise Act and Rules for which an appropriate penalty can be imposed. In the impugned order the Commissioner demanded duty on the inputs event though his finding speaks of improper accounting.

3. In view of my observations above, I hold that the penalty of Rs. 1 lakhs is not imposable and duty on the alleged shortage of inputs also cannot be demanded. In this view of the matter the question of imposing penalty and demanding interest also does not arise. The appeal is allowed.

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